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NO. 80-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN MEDICAL ASSOCIATION, CONNECTICUT STATE MEDICAL SOCIETY, NEW HAVEN COUNTY MEDICAL ASSOCIATION, INC.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

In *Goldfarb* v. *Virginia State Bar*, this Court decided that professional associations are subject to the Sherman Act. In *Bates* v. *State Bar of Arizona*, the Court ruled that such associations "have a special role to play" in defining "the boundary between deceptive and nondeceptive advertising." This case presents two questions relating to whether the Federal Trade Commission may impose a coercive order against a medical association which promptly after *Goldfarb* carried out its "special role" by publishing ethical guidelines defining the boundary between deceptive and nondeceptive practices:

1. Whether the FTC has jurisdiction over nonprofit professional associations—where, under § 4 of the Federal Trade Commission Act, the FTC may regulate an association only if it is "organized to carry on business for its own profit or that of its members" and where in 1977 Congress specifically declined to extend the agency's jurisdiction to non-profit organizations?

2. Whether, without any analysis of competitive consequences, the FTC may condemn an ethical canon, quoted extensively in *Bates*, which encourages dissemination of truthful information but which declares unethical four specific deceptive practices?

RULE 28.1 STATEMENT

The only subsidiaries of petitioner American Medical Association are the AMA-Education and Research Foundation and the American Medical Assurance Corporation. The AMA is not the parent or affiliate of state medical societies within the apparent meaning of Supreme Court Rule 28.1 although these independent and autonomous organizations do send delegates to the House of Delegates of the AMA.

Petitioners Connecticut State Medical Society and New Haven County Medical Association, Inc. have no parents, subsidiaries, or affiliates within the apparent meaning of Supreme Court Rule 28.1 although the Connecticut State Medical Society sends delegates to the AMA House of Delegates and has a House of Delegates comprised of delegates from county medical associations in Connecticut.

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OPINIONS BELOW

The majority opinion of the Court of Appeals, written by District Judge Bonsal sitting by designation (Appendix A, at 2a), and the dissenting opinion of Judge Mansfield (Appendix A, at 23a) are reported at 638 F.2d 443 (2d Cir. 1980). The Opinion of the Federal Trade Commission, per Commissioner Clanton (Appendix B, at 312a), and the Initial Decision of the Administrative Law Judge (Appendix B, at 37a) are reported at 94 F.T.C. 701 (1979).

JURISDICTION

The judgment of the Court of Appeals was entered on October 7, 1980. The Court denied a timely petition for rehearing with suggestion for rehearing in banc on November 25, 1980. *See* Appendix C. On February 17, 1981, Justice Marshall granted petitioners an extension of time to file this petition to and including April 8, 1981. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 5(a) and the relevant paragraph of § 4 of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a) and 44, are set forth in Appendix D hereto.

STATEMENT OF THE CASE

A. The American Medical Association

Petitioner American Medical Association ("AMA" or "Association") is a non-profit corporation operating under the Illinois Not For Profit Corporation Act, Ill. Rev. Stats., ch. 32, §§ 163 *et seq.* The principal purposes of the Association are and have always been to advance medical science and education and to upgrade the health of the American people. Since its founding in 1846, the Association has sponsored a vast array of educational, scientific, and public health programs which the Commission found to be "a laudable public service." Appendix B, at 319a. Currently, for example, it participates in the accreditation of all levels of medical education. It disseminates health care information without charge to the public. It publishes scientific journals, books, and monographs. It evaluates the safety and effectiveness of drugs. It sponsors programs related to mental illness, alcoholism, television violence, drug abuse,

food and nutrition, and the quality of medical care in jails and prisons. *See* Appendix B, at 47a-70a.

The Association also provides ancillary services such as practice management seminars and insurance programs, which the Commission found to have "pecuniary benefit for its members." *See* Appendix B, at 318a. These services are miniscule in relation to the overwhelming educational and scientific activities of the Association. These educational and scientific activities indisputably constitute the vast majority of its programs and are the "heart and soul" of the organization, the reason for the AMA's existence. (Transcript ("Tr."), pp. 5183-5184).

Membership in the Association is entirely voluntary. Physicians are licensed by the state and are free to join or not join the Association as they see fit. They need not belong to the Association in order to obtain licensure or specialty certification, practice medicine, secure malpractice insurance, or receive hospital staff privileges (Tr. 3944-47). If a member violates the Association's ethical principles, including those challenged by the FTC, the maximum sanction is revocation of the physician's membership in the Association. Notably, the Association has no power whatsoever over physicians who choose not to join and does not impose its ethical principles on non-members.

B. The Connecticut Petitioners

Petitioners Connecticut State Medical Society ("State Society") and New Haven County Medical Association Inc. ("County Association") are voluntary non-profit professional associations under Connecticut law. The State Society was chartered by the Connecticut legislature as a non-profit scientific and professional association in 1792 for the pur-

pose of administering degrees in medicine and promoting the public welfare and education. Throughout its history, the State Society has been active in scientific matters. For example, it has numerous active scientific sections and committees and holds an annual scientific assembly for the presentation and discussion of medical subjects. It publishes a scientific journal, a sports medicine periodical, and informational booklets on health care topics. In addition, it sponsors continuing medical education programs and cost-containment seminars open to all interested persons. The County Association, founded in the late 1700's, focuses on local health care issues in the New Haven area. Its committees often function in an ombudsman capacity on behalf of community members having inquiries or complaints about medical care.

Neither the State Society nor the County Association is a chapter or subsidiary of the AMA. Each makes its own policies and has its own governing body. Members of the State Society and County Association are not required to become members of the AMA. In fact, only about half of each association's members have chosen to join the AMA.

C. The Ethical Standards of the American Medical Association.

This case focuses on the ethical standards of the American Medical Association. The basic set of ethical principles of the Association is a short statement of broad general precepts known as *The Principles of Medical Ethics*. These broad precepts are interpreted for AMA members by the Association's Judicial Council. At all times relevant to this case, its interpretations were contained in a volume entitled *Opinions and Reports* of the Judicial Council. They

are revised periodically to reflect changes in medical practice, social values, and law.[1] Appendix B, at 244a.

On June 16, 1975, this Court held in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), that the learned professions are subject to the Sherman Act. Aware of the profound implications of that case and determined to comply with the antitrust laws, the Association promptly ceased distribution of the then most recently published edition of the *Opinions and Reports*, the 1971 edition. In November of 1975, a month before this case was instituted, the Association began revising its ethical statements in light of *Goldfarb* and changing social values. Appendix B, at 244a.

On April 9, 1976, the Association issued a comprehensive statement on advertising and solicitation which sought to define the boundary between deceptive and non-deceptive practices. *Id. See* Appendix E. This statement declares that dissemination of fee information and other useful information that will assist patients in making an informed choice among physicians is ethical:

> "*Advertising.* The principles do not proscribe advertising . . . . Advertising means the action of making information or intention known to the public. The public is entitled to know the names of physicians, the type of their practices, the location of their offices, their office hours, and other useful information that will

[1] The Connecticut petitioners have adopted the AMA's Principles of Medical Ethics but not the *Opinions and Reports* of the Judicial Council. The Connecticut petitioners do not prohibit members from advertising and have never disciplined anyone therefor. They believe that advertising by physicians should not be false or deceptive and that medical associations should retain the right to discipline members who engage in improper conduct.

enable people to make a more informed choice of physician.

"The physician may furnish this information through the accepted local media for advertising or communication, which are open to all physicians on like conditions. Office signs, professional cards, dignified announcements, telephone directory listings, and reputable directories are examples of acceptable media for making information available to the public.

"A physician may give biographical and other relevant data for listing in a reputable directory. A directory is not reputable if its contents are false, misleading, or deceptive or if it is promoted through fraud or misrepresentation. If the physician, at his option, chooses to supply fee information, the published data may include his charge for a standard office visit or his fee or range of fees for specific types of services, provided disclosure is made of the variable and other pertinent factors affecting the amount of the fee specified. The published data may include other relevant facts about the physician, but false, misleading, or deceptive statements or claims should be avoided."

The 1976 statement further declares that "solicitation" is unethical.[2] Solicitation is narrowly and specifically defined to cover four promotional practices which have a significant capacity to mislead patients. These are: (1) physician testimonials, (2) claims intended or likely to create inflated or unjustified expectations or results, (3) self-

[2] The Principles of Medical Ethics in existence in 1976 proscribed "solicitation." In 1980, the AMA adopted a new set of Principles which eliminates all references to "solicitation." *See* Appendix A, at 30a. In January of 1981, the Judicial Council issued a statement on advertising under the 1980 Principles which, *inter alia*, clarifies that the Association has no objection to nondeceptive advertising in mass media. This statement has been incorporated in *The Current Opinions of the Judicial Council of the American Medical Association-1981*, published in March of 1981.

laudatory claims which imply that the physician has skills superior to other physicians with like training, and (4) advertisements containing incomplete or incorrect facts or representations that would cause the average person to be deceived.

The 1976 statement on advertising and solicitation was incorporated in a new edition of the *Opinion and Reports* published in March of 1977. Three months later, this Court decided *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). The Court stated that professional associations should play a "special role" in "defining the boundary" between deceptive and nondeceptive advertising. *Id.* at 383-384. It quoted at length from the AMA's position on advertising and solicitation. *Id.* at 369-370 n.20.

D. Proceedings Before The Commission.

On December 19, 1975—after the AMA had already begun reevaluating its ethical standards in light of *Goldfarb*—the Federal Trade Commission issued its complaint in this matter. It charged that petitioners had restricted the ability of their members to advertise and to enter into certain contractual relationships, in violation of § 5(a) of the Federal Trade Commission Act. The complaint represented the first time that the Commission had challenged the ethical precepts of a professional association. Yet it was issued without any investigation, without any attempt to ascertain petitioners' current positions or policies, and without any effort to determine whether formal proceedings were necessary to serve the public interest.[3]

[3] Robert B. Reich, Director of Policy Planning for the FTC, has observed: "Too often, we regulators act like sheriffs in the Wild West, shooting first with subpoena and injunction and asking questions later." *Business Week* (October 27, 1980).

Trial of the case extended from September of 1977 through May of 1978. The American Medical Association did not defend pre-*Goldfarb* positions contained in the 1971 edition of the *Opinions and Reports* because these positions, many of which dated back to the 1930's or earlier, did not represent its policy and had not done so for many years. Indeed, the Judicial Council had approved physician advertising and contract practice in the only instance in which it considered these issues in the context of a specific case. *Matter of Ben E. Landess, M.D.* (1955). *See* Appendix A, at 13a.

Rather, the defense rested principally on two grounds. First, petitioners urged that the Commission may not regulate *bona fide*, non-profit professional associations because § 4 of the Federal Trade Commission Act precludes the agency from exercising jurisdiction over associations that are not "organized to carry on business" for their own "profit" or that of their members. Second, the AMA contended that its 1976 statement on advertising and solicitation satisfies the requirements of § 5 of the Act because it has neither the purpose nor the effect of suppressing competition. The evidence introduced before the Commission demonstrated that the 1976 statement promotes competition because it discourages practices with a significant capacity to mislead patients.[4]

[4] These practices can result in terrible tragedy. The record contains numerous examples of individuals who, vulnerable to superficially appealing promises or suggestions of cure, were lured through deceptive advertising to unscrupulous physicians. *See*, e.g. Tr. 6695-6772, 6767-6784, 6794-6820, 6824-6852, 6854-6871. It includes, for example, the testimony of women who responded to seemingly innocuous ads in media such as *T.V. Guide* promoting various forms of cosmetic surgery. These ads featured testimonials by satisfied supposed former patients, alluring pictures of shapely women implying that those who underwent surgery would be made similarly beautiful, claims falsely implying that the advertiser's

Specifically, testimonials for physicians are generally based on anecdotal evidence and tend to deceive by implying that the testimoniant's experience will be duplicated by other patients when in fact, because of the variety and complexity of symptoms, diseases, and treatments, this is not the case. Advertisements which are likely to create inflated expectations of favorable results give no meaningful information on which to choose a physician and appeal instead to anxiety and fear. Self-laudatory statements implying that a physician has superior skills are incapable of verification and are likely to be based on unsupportable data. Finally, advertisements containing incomplete or incorrect representations likely to deceive the average person are misleading by definition.

Following the initial decision by the administrative law judge, the Commission held on October 12, 1979 that petitioners are subject to its jurisdiction and had violated § 5 of the Federal Trade Commission Act. It entered a sweeping cease and desist order that prohibited the AMA from *inter alia:*

1. Involving itself in any way in the advertising practices of physicians unless those practices "would be false or

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skill was superior to other surgeons, and a variety of other representations likely to deceive the average person, e.g. statements that the ad was run by an organization with a humane sounding name such as "Women Who Help Women" when in fact the organization was simply a front for charlatans. *See* Appendix F for examples. In each instance, the woman chose her surgeon on the basis of the advertisement, often after having been advised by other physicians that cosmetic surgery was inadvisable in her case. These women testified how they were mutilated by the advertising surgeons—undergoing operation after operation under horrible conditions which left them physically and psychologically scarred for life. One woman even testified how her daughter died at the hands of an advertising surgeon after having been turned down for surgery by three non-advertising physicians.

deceptive within the meaning of Section 5 of the Federal Trade Commission Act" (Order, Part I);

2. Involving itself in any way in the consideration provided to physicians for their services—regardless of how contrary to the public interest such consideration might be, *e.g.*, fee gouging and secret fee splitting arrangements (Order, Part IIA) (Appendix B, at 369a-373a)[5].

The Commission agreed that petitioners are *bona fide*, nonprofit corporations engaged in scientific, educational, and public health programs (*Id.* at 319a). It nevertheless held that because it had found that some of petitioners' activities confer a pecuniary benefit on their members, these medical societies are "corporations" within the meaning of § 4. *Id.* at 318a.

On the merits, although the AMA had not defended pre-*Goldfarb* statements from the 1971 *Opinions and Reports*, the Commission discussed these statements at length and held that they were anticompetitive and thus violate § 5. *Id.* at 334a-343a. The Commission further held that the AMA's 1976 statement on advertising and solicitation not only did not eliminate the need for an order but rather established the "danger of permitting the medical profession broad discretion" in offering its members guidance concerning deceptive practices. *Id.* at 363a.

The Commission made no analysis whatsoever of the competitive significance of the AMA's 1976 statement on advertising by physicians. Instead, through what it termed "exegesis," the Commission concluded that virtually every aspect of the AMA's 1976 position is either "overbroad," "troublesome," or otherwise unacceptable. *Id.* at 354a-358a.

[5] The Commission bound the Connecticut petitioners to this Order by requiring the AMA to disaffiliate any association that did not voluntarily agree to its substantive terms. Appendix B, at 364a, 371a.

Two examples will illustrate the Commission's approach. First, the Commission chose to ignore the second clause in the AMA's stance on claims that "are self-laudatory *and* imply that the physician has skills superior to other physicians engaged in his field or specialty of practice" (emphasis supplied). Thus, it was able to mischaracterize this stance as a ban on "all forms of comparative advertising, no matter how truthful," *Id.* at 355a, when in fact the statement is concerned only with non-verifiable, self-laudatory claims that imply that the physician has skills superior to other physicians with the same specialty. In this context, the Commission specifically rejected the AMA's position that claims relating to quality of service are unethical where these claims cannot be verified and convey no information useful in making an informed choice among physicians. *Id.*

Second, the Commission detected a "worrisome" "overbreadth" in the position against claims that "are likely to cause the average person to misunderstand or be deceived." *Id.* at 356a. It disapproved this position for not stating that immaterial facts can be omitted from advertising, *Id.*, when in fact this thought is obviously implicit in the AMA's position. It further objected on grounds that the position makes no explicit provision for "representations directed to a sophisticated group of consumers." *Id.*

Through similar "exegesis," the Commission faulted every other aspect of the 1976 statement. It concluded that the Association's stance against physician testimonials is unacceptably overbroad. *Id.* It characterized as "troublesome" the proscription of claims containing "incomplete facts." *Id.* Finally, it saw "danger" in the "apparent overlap" between the position against claims containing "incomplete facts" and those "likely to create inflated or unjustifiable expectations of favorable results." *Id.*

While disapproving the AMA's position as overly broad, the Commission announced that it itself was incapable of drafting new guidelines that distinguished with precision deceptive from nondeceptive advertising by physicians. *Id.* at 362a.

E. The Court of Appeals Decision

Although it modified the FTC's order in respects not here material, a divided Court of Appeals for the Second Circuit upheld the Commission's decision to issue a cease and desist order. On the jurisdictional issue, it rejected petitioners' claim that *bona fide,* non-profit professional associations are outside the FTC's authority. It held that the Commission's jurisdiction to regulate petitioners was established by the finding that they served "business" as well as "non-business" interests of their members. Appendix A, at 9a.

On the merits, the Court of Appeals concluded that it was proper for the Commission to rely upon the AMA's outdated, pre-*Goldfarb,* pre-*Bates* ethical guidelines to condemn the AMA's 1976 position on advertising and solicitation. *Id.* at 12a. It further held that "[i]n any event," the Commission had properly ruled that these positions "were insufficient" to satisfy the standards of § 5 of the Federal Trade Commission Act. *Id.* at 16a. In so holding, the Court of Appeals explicitly approved the Commission's statement that the AMA's admonition against self-laudatory claims that "imply skills superior to those of other physicians with like training and experience" is overbroad because it bans self-laudatory advertising that is "fully accurate." *Id.* at 16a, n.6.

Judge Mansfield dissented from the Court of Appeals' conclusion that the AMA had violated § 5. He reasoned that the 1976 positions, as incorporated in the 1977 *Opinions and*

Reports, "substantially comply with antitrust requirements," for they indicate that dissemination of non-deceptive information is ethical and condemn "only certain deceptive promotional devices which clearly have a significant capacity to mislead." Appendix A, at 27a. Judge Mansfield characterized the Commission's obsession with outdated pre-*Goldfarb* standards as "pressing for its pound of flesh" and engaging "in the futile business of beating a dead horse." *Id.* at 23a. He concluded that the entire proceeding was "unjustified, unnecessary, and a waste of administrative and judicial resources." *Id.*

REASONS FOR GRANTING THE WRIT

This case presents two important questions concerning the FTC's authority to condemn, and effectively pre-empt, responsible efforts at self-regulation by the professions. First, it raises the issue of whether the Commission has jurisdiction over non-profit, professional associations—a question as to which the Second Circuit and the Eighth Circuit are in conflict. Second, it presents the issue, explicitly reserved in *Bates*, 433 U.S. at 383-384, of whether professionals may associate together and take positions against specified categories of advertising relating to quality of services which they reasonably regard as deceptive. May the Federal Trade Commission pre-empt such positions without any analysis of their effect on competition by misconstruing them through hypercritical "exegesis"?[6]

[6] The issues posed by the Commission's treatment of the AMA's 1976 statement on advertising are also posed by the agency's treatment of the Association's post-*Goldfarb* positions on contract practice. For the same reasons discussed with respect to advertising, the provisions of the FTC's Order dealing with contract practice should likewise not be allowed to stand.

I. Whether The Federal Trade Commission Has Jurisdiction Over Non-Profit, Professional Associations Is An Important Question On Which There Is A Conflict Among The Federal Courts of Appeals

Unlike the Sherman Act, the Federal Trade Commission Act does not apply to all entities. Section 5(a)(2) of the Act explicitly limits the Commission's jurisdiction to "persons, partnerships, or corporations." Section 4 of the Act carefully defines the "corporations" that are subject to the Act in terms of whether they are organized to carry on business for the profit of themselves or their members. Specifically, § 4 states that the term "corporation" for purposes of the Act means:

> ". . . any company, trust . . . or association . . . which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and *any* company, trust . . . or *association*, incorporated or unincorporated, *without shares of capital stock* or certificates of interest, except partnerships, *which is organized to carry on business for its own profit or that of its members.*" (emphasis supplied.)

In this case, the Court of Appeals held that a non-profit professional society is a "corporation" subject to regulation by the Commission if it serves the "business interests" of its members in any way. Appendix A, at 9a.

The Second Circuit's holding is squarely in conflict with *Community Blood Bank of the Kansas City Area* v. *FTC*, 405 F.2d 1011 (8th Cir. 1969), *rev'g In re Community Blood Bank*, 70 F.T.C. 728 (1966). There, the Eighth Circuit held that a non-profit hospital association and a community blood bank were outside the authority of the Commission. The hospital association in *Community Blood Bank* resembled the medical associations here in all relevant respects. In addition to its eleemosynary functions, it served

the business interests of its member hospitals—assisting in the training and procurement of personnel, providing coordinated planning and financing, and furnishing a forum for resolving questions by pathologists. 70 F.T.C. at 863-64. Indeed, the Commission specifically found that the association "performed very valuable services" for its members. *Id.* at 864.

The Eighth Circuit recognized, however, that the test of jurisdiction under the Act is whether an entity is "organized" for the pecuniary "profit" of its members, not whether it incidentally confers some economic benefit on them. Thus, it held that whether the FTC has jurisdiction over a corporation depends on the "reality" of whether the corporation "in law and in fact" operates as a non-profit organization. 405 F.2d at 1019. As the Court emphasized:

> "[t]he uncontradicted evidence shows, and the Commission found, that *no part of any funds received by Community and AHA have ever been distributed* or inured to the benefit of any of their members, directors or officers; *all receipts have been used exclusively for the purposes authorized by law* and their articles of incorporation; *all funds received by Community originated from gifts, loans and grants, replacement blood donations and payment of responsibility and processing fees; AHA received its funds from grants, loans, gifts and dues of member hospitals.* Of added significance is the finding that the receipts by Community have not been sufficient to meet expenses and to repay outstanding loans." *Id.* at 1020 (emphasis supplied).

Under this test, petitioners here are plainly not subject to the jurisdiction of the Commission.[7]

The analysis of the Eighth Circuit in *Community Blood Bank* is correct. Section 4's careful definition of "corporation" would mean little if it did not exclude medical societies which are organized, not for profit, but to advance science, education, and the public health. The legislative history of § 4, moreover, confirms that Congress did not intend to subject professional societies to regulation by the Commission. When the Federal Trade Commission Act was passed in 1914, no representatives of professional associations were invited to testify. No mention of such associations appears in the relevant Congressional debates. Indeed, in 1914, the professions were not regarded as subject to the antitrust laws, a fact which has led courts to hold them outside the scope of other antitrust statutes of limited jurisdiction. *See Feminist Women's Health Center* v. *Mohammad*, 586 F.2d 530, 552-53 (5th Cir. 1978) (Wisdom, J.). Furthermore, when the Commission specifically asked Congress in 1977 to amend § 4 to extend its jurisdiction to non-profit corporations, including professional societies, Congress expressly

[7] The Court of Appeals in this case attempted to distinguish *Community Blood Bank* on grounds that (1) it involved a "blood bank run as a charitable corporation" and that (2) the Eighth Circuit had stated that "Congress did not intend to provide a blanket exclusion of all non-profit corporations." Appendix A, at 9a. The first purported distinction overlooks that a hospital association which was similar to petitioners in all relevant respects was also found to be beyond the jurisdiction of the Commission. The second ignores that the exception recognized by the Eighth Circuit was for "sham" non-profit corporations. 405 F.2d at 1017. *See, e.g., Ohio Christian College*, 80 F.T.C. 815 (1972).

declined to do so.[8] *See* Rosoff, *Antitrust Laws and the Health Care Industry*, 23 St. Louis U.L.J. 446, 458-460 (1979).

The question of the authority of the Federal Trade Commission over professional associations is of great importance. Since *Goldfarb*, the Commission has made regulation of such associations a top priority. It has challenged the ethical standards of the American Dental Association (FTC Dkt. No. 9093, CCH Trade Reg. Rptr. ¶ 21,562 (1979)). It has brought actions against a dental association, *Indiana Federation of Dentists* (FTC Dkt. No. 9118, CCH Trade Reg. Rptr. ¶ 21,671 (1980)), and a state medical society, *Michigan State Medical Society* (FTC Dkt. No. 9129, CCH Trade Reg. Rptr. ¶ 21,596 (1979)), which have not yet reached the appellate stage. It has secured consent decrees against several state and specialty medical societies whose resources were too limited to allow them to contest jurisdiction. *See, e.g., American College of Obstetricians and Gynecologists*, CCH Trade Reg. Rptr. ¶ 21,171 (1977); *American Society of Anesthesiologists, Id.* ¶ 21,475

[8] The reason for the Congressional decision on this point was summarized in the minority report of the House Committee on Interstate and Foreign Commerce:

> "At the present time, the jurisdiction of the Commission is limited to profit-making bodies. The effect of this provision would have been to extend the regulatory reach of the FTC to non-profit organizations. The full Committee deleted this provision and we fully concur in the Committee's decision in this regard. In reviewing the record, we note that the FTC made a very weak case for extending its jurisdiction in this fashion. On the other hand, the non-profit groups presented a very strong case in favor of deleting the new provision. In our view, the FTC does not have jurisdiction over non-profit organizations, nor should they." *See* H.R. Rep. No. 95-339, 95th Cong., 1st Sess. 120 (1977).

(1978); *Minnesota State Medical Society, Id.* ¶ 21,293 (1977). It has issued rules with respect to the ethics of the optometry profession, *American Optometric Association* v. *FTC*, 626 F.2d 896 (D.C. Cir. 1980), and investigated the possibility of rule-making on ethics in the veterinary and accounting professions. FTC File Nos. 762 3074, 772 3025. Finally, it is in the process of issuing questionnaires to every state bar association in the country. FTC File No. 782 3010.

The Commission's efforts to apply the nebulous standard of § 5 of the Federal Trade Commission Act to a wide variety of self-regulatory efforts of professional societies imposes enormous burdens on these societies and requires them to divert substantial resources from their non-profit objectives. Most significantly, the Commission's intervention in this area has caused many associations to halt socially desirable activities, e.g., peer review of excessive fees, for fear of becoming involved in protracted and financially debilitating administrative proceedings. A decision to issue a writ of certiorari, resolve the conflict in the Circuits, and definitively decide whether Congress gave the Commission jurisdiction over non-profit, professional associations will thus affect many pending and future proceedings and the activities of professional associations across the country.

II. Whether, Without Analysis Of Competitive Consequences, The Federal Trade Commission May Prevent Professionals Who Have Voluntarily Associated Together From Taking A Position Against Promotional Practices Which They Believe To Be Deceptive Is A Question Of Enormous Importance.

The second question in this case is of great importance, not only to professional associations striving to carry out the "special role" envisioned for them in *Bates*, but also

to countless patients throughout America. The Commission had adopted, and the Court of Appeals has endorsed, an approach to reviewing canons of professional ethics based on "exegesis" rather than on an analysis of their competitive significance. This approach is fundamentally inconsistent with the antitrust laws and with prior decisions of this Court which recognize that responsible professional self-regulation furthers paramount public interests. Indeed, because this Court in *Bates* saw fit to quote extensively from the AMA's 1976 position on advertising, 433 U.S. at 369-370, n.20, the Commission's ruling appears directly in conflict with that decision.

In *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 690 (1978), this Court held that a tribunal reviewing an ethical canon addressing professional deception is confined to considering its "impact on competitive conditions."[9] Yet the Commission disapproved the AMA's 1976 statement on advertising and solicitation without even considering whether it had the purpose or effect of suppressing competition. It made no inquiry into the effect of this statement on the price, availability, or quality of physicians' services.

Instead, the Commission used pre-*Goldfarb* statements as a pretext to avoid proper antitrust analysis of the 1976

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[9] The question of how § 1 of the Sherman Act applies to the organized activities of physicians and other professionals is also presented, albeit in a different context, in another case now pending in this court, *Arizona* v. *Maricopa County Medical Society*, F.2d , 1980-1 Trade Cases ¶ 63,239 (9th Cir. 1980), *cert. granted*, No. 80-419, 49 U.S.L.W. 3658 (March 10, 1981).

position.[10] It engaged in an extended analysis of obsolete statements that the Association did not defend and that Judge Mansfield properly characterized as a "straw-man". Appendix A, at 31a. Having found the pre-*Goldfarb* "straw-man" unlawful, it proceeded to condemn the AMA's actual position simply by characterizing it as "overbroad" or "troublesome" on the basis of strained and patently unreasonable interpretations. Appendix B, at 354a-358a.

In short, the test of legality applied by the Commission and upheld by the Court of Appeals is whether an ethical canon has been written to eliminate any conceivable possibility of misinterpretation. This test will effectively preclude professional associations from establishing ethical norms or offering meaningful guidance concerning deceptive practices because it is a test that cannot be met. The Commission recognized as much by conceding that even it could not frame acceptable general guidelines on deceptive advertising by physicians with sufficient precision, Appendix B, at 362a, and by declaring that "(a)cross-the-board bans on entire categories of representations" are "highly suspect." *Id.*

The Commission's approach is blatantly at odds with decisions of this Court which have repeatedly held that "the problem of professional deception is a proper subject of an ethical canon." *Professional Engineers, supra,* 435

[10] The Commission's reliance on these outdated statements to find liability is itself contrary to decisions of this Court. Discontinued conduct may not be the basis of a coercive order unless it "predicts the shape of things to come," *United States* v. *Oregon State Medical Society,* 343 U.S. 326, 333 (1952) and "there exists some danger of recurrent violation." *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 633 (1953). As Judge Mansfield observed below, there is almost nothing more certain than that the AMA will not revive outmoded pre-*Goldfarb,* pre-*Bates* guidelines. *See* Appendix A at 31a.

U.S. at 696. Nearly fifty years ago, this Court recognized that:

> "The Community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief." *Semler* v. *Board of Dental Examiners*, 294 U.S. 608, 612 (1935).

More recent decisions affirm that responsible efforts at protecting the public from deception promote the public interest and should be encouraged. In *Bates*, this Court stated that "claims relating to the quality of [professional] services . . . are not susceptible of measurement or verification" and "may be so likely to be misleading as to warrant restriction." 433 U.S. at 383-384. The Court explicitly stated that the professions "have a special role to play" in resolving the "problems in defining the boundary between deceptive and nondeceptive advertising" and in assuring that advertising by professionals "flows both freely and cleanly." *Id.* at 384.

Apart from its inconsistency with prior decisions of this Court, the Commission's holding raises serious questions under the First Amendment. As this Court recognized in *Bates*, an ethical guideline that reasonably distinguishes deceptive from nondeceptive advertising is extremely valuable speech. It affords responsible advertisers norms against which to judge promotional practices, helps protect the public from the unscrupulous, and gives guidance to legislators. In these circumstances, the First Amendment requires that a group of professionals who have freely and voluntarily associated together be given substantial "breathing space" to promulgate reasonable standards of ethics. *See In Re Primus*, 436 U.S. 412, 436 (1978). The approach

of the Commission chokes off this breathing space by subjecting this speech to impossible standards of precision.

Perhaps most outrageous is the practical effect of the Commission's decision. If the Commission's approach is upheld and professions are forced to abdicate their responsibilities, the real loser will be the public, often the poor or unsophisticated, who are drawn to incompetent practitioners by the meaningless testimonials, inflated promises, non-verifiable claims of superiority, and outright lies that the AMA's 1976 Statement had condemned. Surely human life and health are too precious to permit such a result.

CONCLUSION

This Court in *Bates* urged professional associations to play a "special role" in defining the boundary between deceptive and non-deceptive practices and quoted extensively from the AMA's effort to do so. Now, far exceeding its statutory mandate, the Federal Trade Commission has imposed a coercive order against an association which responsibly carried out its "special role" even before *Bates*. The action of the Commission, affirmed by a divided Court of Appeals, conflicts with a prior holding of the Eighth Circuit, is contrary to *Bates*, *Professional Engineers*, and other decisions of this Court, and poses a serious threat both to the public health and to professional self-regulation.

Petitioners respectfully ask this Court to take this case before responsible medical societies, stripped of the guidance that *Bates* and *Professional Engineers* had appeared to provide, simply abdicate the field to a government agency which itself acknowledges that it is incapable of drafting precise guidelines. Petitioners request the Court to issue a writ of certiorari, hear argument, and uphold the efforts of the medical profession to establish responsible ethical standards in the public interest.

Respectfully submitted,

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